

# **BAR BULLETIN**

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## **Articles**

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### **Historical Sketch of the Supreme Court of California**

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### **Biographical Sketches of Justices**

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**No. 5**

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## HISTORICAL SKETCH

*To the Members of the Los Angeles Bar Association:*

Gentlemen:

*The brief history of the Supreme Court of our State which follows is presented not as a thorough exposition on the subject, which assuredly it is not, but rather as a summation of the great events in the history of California's supreme judicial tribunal.*

*We, to whose good fortune it has fallen to delve into some of the interesting and varied reading from which this sketch has been drawn, have so enriched our understanding of California jurisprudence and history thereby that we feel the following pages to be a very poor substitute for primary material, and we do, therefore, submit our work to the Bar in full realization of its inadequacy and yet with the hope that it may awaken a more wide-spread interest in a greater and more complete history of the Supreme Court of the State of California.*

Respectfully submitted,

JUNIOR BARRISTERS' BAR BULLETIN COMMITTEE,

By WHITNEY HARRIS,  
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LESLIE C. TUPPER, *Chairman.*

## HISTORICAL SKETCH OF SUPREME COURT OF CALIFORNIA

A complete history of the Supreme Court of California could not be written without a thorough discussion of the history of the State itself, for the Court was created to meet the needs of a rapidly expanding pioneer society, and its development has paced the evolution of that society to a modern western civilization. Even in this brief sketch of the Court, therefore, it is appropriate to refer to the times and conditions which led to its formation.

Under Spanish rule, civilization in the territory which now is California, consisted mainly of missions, occasional presidios and pueblos. The government was patriarchal and justice was in principal part dispensed and administered by commandantes of the presidios and padres of the missions. Little regard was paid to the formal laws of Spain, and there was virtually no need for a centralized judicial system.

After Mexico won her independence from Spain in 1821 the missionary society became disorganized and need arose for efficient civil government. The Mexican constitution of 1837 was adopted for the purpose of establishing order and securing justice throughout the territories of Mexico. The judicial system envisioned thereby provided for *alcaldes*, who were to exercise both executive and limited judicial power, justices of the peace, courts of first instance and a superior tribunal. In fact, however, the somewhat removed "State Department Territory of California" seemed to have only *alcaldes* and justices of the peace for trial courts and the Department governor for an appellate tribunal. As would be expected, it remained the practice of those who adjudicated disputes in the Department of California to rely principally upon local customs and usages rather than upon the Mexican civil law.

During the period of Mexican occupation a constant trickle of American settlers came into California. They were freed from Mexican rule on July 7, 1846, when Commodore John B. Sloat, during the course of the war with Mexico, took possession of the territory of California in the name of the United States.<sup>1</sup>

From 1847 until the adoption of the Constitution in 1849, the territory was ruled by two successive military governors,<sup>2</sup> both of whom had the good judgment, even in that pioneer society, to subordinate military to civil power.<sup>3</sup> During this time the judicial system remained substantially what it had been prior to American occupation, with the exception that appeals were taken to governors

<sup>1</sup>The territory of which California is a part was ceded to the United States by Mexico by the Treaty of Guadalupe Hidalgo, ratified May 16, 1848.

<sup>2</sup>The first of these was Colonel Richard B. Mason who held the post from May 31, 1847, to April 13, 1849. The second was General Bennet Riley who succeeded Colonel Mason and held office until his resignation on December 20, 1849.

<sup>3</sup>One of the first acts of Colonel Mason was the promulgation of an order requiring that cases should be tried by a jury of six in civil matters and of twelve in criminal cases.

of the United States rather than to those of Mexico. The common law came increasingly into use and virtually displaced the civil law in business and many personal transactions.

Two weeks before the signing of the Treaty of Guadalupe Hidalgo, John W. Marshall discovered gold on the South Fork of the American River. The discovery was not generally known when the treaty was ratified, but shortly thereafter the news spread across the continent and led to the great movement of population which history knows as the Gold Rush of '49. The impact of the hordes of gold seekers upon the quiet settlements of California was tremendous. Towns and mining camps sprang up over-night; living costs multiplied many times; miners and squatters seized possession of lands owned by ranchers. Disputes were common and frequently violent, and the absence of responsible government led to general lawlessness. Responsible elements in society, therefore, soon demanded the formation of a government with authority to enact and enforce the laws necessary to stabilize the developing political economy of California.

#### THE CONSTITUTION OF 1849

On June 3, 1849, Governor Bennet Riley issued a call for a constitutional convention to meet in Monterey. The convention formally organized on September 3, 1849, and the constitution which it adopted was ratified by the people on November 13, 1849, giving to California its own first fundamental charter of law and liberty.<sup>4</sup>

The provisions of the Constitution of 1849 relative to the organization of the Supreme Court are found in Article VI. Under the terms of this Article the judicial power of the State was vested in a Supreme Court, District Courts, County Courts, justices of the peace and such inferior courts as the legislature might deem necessary. Provision was made for a Supreme Court to consist of a Chief Justice and two Associate Justices, any two of whom should constitute a forum. The legislature was to elect for the first justices; subsequent justices were to be elected by the people.

The Supreme Court was given appellate jurisdiction of cases where the amount in dispute was in excess of \$200 or when the legality of any tax, toll or impost or municipal fine was in question, and of all criminal cases amounting to felony on questions of law alone. The Court, as well as the justices, was given power to issue writs of habeas corpus and to issue all other writs necessary to the exercise of its appellate jurisdiction.

The times and places of holding court and the fixing of compensation of the justices were left to the legislature; the compensation of the justices was not to be increased or diminished during the term for which they were elected. The justices were to be ineligible to any other office during the term for which they were elected.

<sup>4</sup>It was not until September 9, 1850, that California was admitted to the Union.

The first legislature met at San Jose in December, 1849. One of the first matters undertaken was the election of the Justices of the Supreme Court. S. C. Hastings was elected Chief Justice and Henry A. Lyons and Nathaniel Bennett were elected Associate Justices in December, 1849, over a month before the Act of February 14, 1850,<sup>5</sup> providing for the organization of the Court. The latter Act provided for a special term of the Court at San Francisco and for two terms a year thereafter, at the seat of government. The Court was to make rules for itself not inconsistent with the law. The judgments of the Court were to be remitted as soon as practicable. The compensation of the justices was fixed at \$10,000 by an Act adopted March 5, 1850.<sup>6</sup> At the same session a Practice Act regulating procedure in the Supreme Court and the lower courts was adopted.<sup>7</sup>

### THE FIRST COURT

The first Court met in San Francisco. For a period of three years it was uncertain where the seat of government was going to be because San Jose, Val-lejo, Benicia and Sacramento had various claims. In 1854<sup>8</sup> the legislature fixed the permanent seat of the government at Sacramento. The duty then devolved upon the Court to determine which of various acts fixing the seat of government was valid, since the Court was required to sit at the seat of the government. The Court eventually decided, in *People v. Bigler*,<sup>9</sup> that the act transferring the seat of government to Sacramento was valid.

The most notorious of the justices who served on the Court between 1850 and 1864 was David S. Terry and the most famous justice of that time was Stephen J. Field. In 1856, while an associate justice of the Supreme Court, Terry stabbed a member of the Vigilante Committee; in 1859 he resigned as Chief Justice of the Court to fight a duel in which he killed David C. Broderick; and in 1889 Terry himself was shot and killed by Field's bodyguard.

Stephen J. Field was one of the most outstanding of all justices who have served on the Court; he contributed more than any other individual to the creation of the legal system of California. As a member of the legislature in 1851, he drafted the Practice Act of that year<sup>10</sup> and the Criminal Practice Act.<sup>11</sup> Appointed to the Supreme Court in 1857 to fill an unexpired term, he became Chief Justice two years later and served as such until 1863 when he resigned to accept an appointment to the United States Supreme Court.<sup>12</sup>

During the existence of the Vigilante Committee, from May to August, 1856, the Court was not in session. The Vigilante Committee, which was organ-

<sup>5</sup>Stats. 1850, p. 57.

<sup>6</sup>Stats. 1850, p. 83.

<sup>7</sup>Stats. 1850, p. 428.

<sup>8</sup>Stats. 1854, p. 7.

<sup>9</sup>(1855) 5 Cal. 23.

<sup>10</sup>Stats. 1851, p. 51.

<sup>11</sup>Stats. 1851, p. 212.

<sup>12</sup>Field's life and work are most fully described in Swisher, *Stephen J. Field, Craftsman of the Law* (1930).

ized to combat lawlessness in San Francisco, had taken Justice Terry into custody for stabbing a member of the Committee. Justice Heydenfeldt was on a leave of absence granted by the legislature and Chief Justice Murray was in another part of the State.

### THE FIRST PROBLEMS

As mentioned, the legal system of California prior to the formation of the State was, theoretically at least, based upon the Civil Law as modified by Spanish and Mexican legislation. The Schedule of the Constitution of 1849<sup>13</sup> continued in force, until altered or repealed by the legislature, all laws in effect at the time of the adoption of the Constitution and not inconsistent therewith. An act passed by the first legislature on April 13, 1850,<sup>14</sup> provided that the Common Law of England, so far as not repugnant to or inconsistent with the Constitution of the United States, or Constitution or laws of State of California should be the rule of decision. A week later another act was adopted which repealed all laws in force but saved rights acquired, contracts made or suits pending.<sup>15</sup> The question of what law applied before the adoption of this latter act was raised before the Supreme Court in 1852 in the case of *Fowler v. Smith*<sup>16</sup> where Chief Justice Murray held that the Common Law of usury applied to contract made before April 22, 1850.

The Court granted a rehearing,<sup>17</sup> however, and, in a new opinion by Justice Heydenfeldt, reversed its former position and held that the Civil Law governed transactions which took place prior to April 22, 1850.

Prior to the discovery of gold in California there had been comparatively little mining of precious metals in the United States; the few laws governing minerals on public lands were of local application. Most of the gold discovered in California in the '50's was on public lands. Congress did not enact any statute governing mining in California until 1866, so that, for more than sixteen years after the discovery of gold there was no federal statute governing mining. Consequently, miners drafted regulations in the various mining districts and followed their own customs. These regulations and customs were given legislative sanction in the Practice Act of 1851<sup>18</sup> and received judicial approval in the case of *Morton v. Solambo Copper Mining Co.*<sup>19</sup>

One of the first questions to arise was whether gold found in the public domain belonged to the State or to the federal government. In *Hicks v. Bell*,<sup>20</sup> Justice Heydenfeldt indicated that it was the Court's opinion that gold and silver on public lands belonged to the State. Chief Justice Field repudiated this doc-

<sup>13</sup>Constitution of 1849, Section 1 of Schedule.

<sup>14</sup>Stats. 1850, p. 219; language of this act now incorporated in *Pol. Code*, Sec. 4468.

<sup>15</sup>Stats. 1850, p. 342.

<sup>16</sup>(1852) 2 Cal. 39.

<sup>17</sup>(1852) 2 Cal. 568.

<sup>18</sup>Stats. 1851, p. 51.

<sup>19</sup>(1864) 26 Cal. 528.

<sup>20</sup>(1853) 2 Cal. 219.

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trine in *Moore v. Smaw*,<sup>21</sup> wherein the court finally ruled that such precious metals belonged to the United States.

The question whether gold on land patented by the United States to a private individual could be prospected for and taken by the public arose in the case of *Fremont v. Flower*,<sup>22</sup> Fremont had acquired a tract of land conveyed to his predecessor by the Mexican Governor in 1844; Fremont's title was subsequently confirmed by the Federal Court. Under Mexican law in force when Fremont's predecessor acquired the land, title to all precious metals located thereon remained in the nation. The Court, per Chief Justice Field held in this case, however, that the gold and silver and other precious metals on the land belonged to the owner of the land.

Many of those who came to California during and after the gold rush had little or no property and failed to improve their fortunes. When the feverish quest for gold abated, some of these people, searching for land on which to settle, eyed enviously the large ranchos previously acquired by the Spaniards and Mexicans. These ranchos occupied a large portion of the best agricultural lands in the State. The political power of squatters in California in the '50's was sufficient to induce the legislature, in 1856, to enact the "Settlers Act"<sup>23</sup> which provided *inter alia*, that all lands in the State should be deemed public lands until title was shown to have passed from the government to private parties. This act was held unconstitutional in *Lathrop v. Mills*,<sup>24</sup> principally because, in effect, it invalidated all Mexican titles which were entitled to protection under the treaty of Guadalupe Hidalgo, and the Federal and State Constitutions.

The practice of the Court in not writing opinions in all of its cases led to a provision in the Practice Act of 1854 which required all decisions of the Supreme Court to be in writing and to set out the reasons for each decision. The validity of this statute was challenged in *Houston v. Williams*<sup>25</sup> and Chief Justice Field declared the act to be unconstitutional in that it encroached upon the independence of the judiciary.

#### CONSTITUTIONAL AMENDMENTS OF 1862 AND 1879

The constitutional provisions relative to the organization of the Supreme Court were amended for the first time in 1862. The number of justices was increased from three to five and the term of office was enlarged to ten years. All judges were to be elected at special elections rather than at the general elections. The jurisdictional limit of the Supreme Court was raised from \$200 to \$300.

Pursuant to these constitutional amendments a new Court was elected October 21, 1863 and assumed its duties in January of 1864. The new justices were

<sup>21</sup>(1861) 17 Cal. 199.

<sup>22</sup>(1861) 17 Cal. 199.

<sup>23</sup>Stats. 1856, p. 54.

<sup>24</sup>(1861) 19 Cal. 513.

<sup>25</sup>(1859) 13 Cal. 24.

Silas W. Sanderson, Chief Justice, and Oscar L. Shafter, Lorenzo Sawyer and A. L. Rhodes, Associate Justices. The only justice who served all during the existence of this Court, that is, from 1864 to 1879 was Justice Rhodes. During this period of fifteen years twelve justices served on the Court.

With the exception of one year, 1862, the year of the flood in Sacramento, the Court sat at Sacramento from 1855 to 1878. In the latter year the Code of Civil Procedure was amended to provide, for the first time, that the Court should hold two terms each year in San Francisco, Los Angeles and Sacramento.<sup>26</sup>

The new Constitution adopted in 1879 abolished all existing courts except Justice's and Police Courts. A new Supreme Court was provided for in Article VI with seven justices, the number on the Court today. Another provision, still in force, provided that there should be two departments of the Court; that the Chief Justice should assign three justices to each department; that each department should have power to hear and determine cases; that the concurrence of three justices was necessary to pronounce a judgment in department; and that the Chief Justice could order any cause to be decided by the Court in bank, provided that if the order were made in a case which had been decided by one of the departments the order would have to be made within thirty days of the judgment and would have to be concurred in by two associate justices. Any four justices could order a case to be heard in bank either before or after judgment in department. When the Court sat in bank the concurrence of four justices was necessary to pronounce a judgment.

All decisions of the Court, whether in bank or in department were required to be given in writing and to state the grounds of the decision.<sup>27</sup> Members of the Court were to be elected at general elections rather than at special elections. The term of office was fixed at twelve years, the same as it is today. In the event of a vacancy the governor was to fill the vacancy by appointment, the appointee to serve until the next general election, and the justice elected at that time was to hold office during the unexpired term of his predecessor.

In order to do away with an early practice of the legislature, the Constitution provided that the legislature should not grant a leave of absence to any judicial officer and that any judicial officer absent from the State for more than sixty consecutive days would be deemed to have forfeited his office. This provision remains in the Constitution today.

Provision was made for the first time for the removal of justices and judges; they could be removed by concurrent resolution of both houses of the legislature adopted by a two-thirds vote of each house. This provision is still in force. Another method of removal, provided in 1934, will be mentioned later.

The first justices elected under the new constitution were to receive \$6000 a year; thereafter compensation of the justices was to be fixed by the legisla-

<sup>26</sup> Amend. to Codes, 1877-8, p. 22.

<sup>27</sup> See, also, C. C. P., Sec. 53; Radin, *The Requirement of Written Opinions* (1930), 18 Calif. L. Rev. 486; see, Preface to Volume 53 of California Reports. In 1913 all available unreported opinions of the Supreme Court and the District Courts of Appeal, except memorandum opinions were gathered together in a series entitled "California Unreported Cases." The Supreme Court often denies writs without writing an opinion; see decisions cited in *Standard Oil Co. v. State Board of Equalization* (1936), 6 Cal. (2d) 557, 59 P. (2d) 119.

The fact that an opinion is not reported in the official reports does not detract from its force as a precedent *MacDonald v. MacDonald* (1909), 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N.S.) 45; *Estate of Little* (1937), 23 Cal. App. (2d) 40, 72 P. (2d) 213.

ture.<sup>28</sup> The constitution retained the provision that the compensation of a justice should not be increased or diminished during the term for which he was elected. It was also provided that no person should be eligible to the office of a justice of the Supreme Court unless he had been admitted to practice before the Supreme Court.

Several delegates to the Constitutional Convention of 1878 complained that judges of the lower courts as well as justices of the Supreme Court often had cases under submission for long periods. In 1872 the legislature had provided that every civil case must be decided and decision filed within six months after submission; that if not so decided the case might again be placed on the calendar by either party and thirty days notice to the other.<sup>29</sup> The delegates to the Convention adopted the more stringent provision that no justice of the Supreme Court or judge of the Superior Court should receive any monthly salary unless he should subscribe to an affidavit that no cause remained pending and undetermined which had been submitted for decision for a period of ninety days. This provision is still effective.

#### THE COURT FROM 1880 TO 1904

Since the Constitution of 1879 abolished the existing Supreme Court, an entirely new Court, the third, was organized as of January, 1880. At the election of September 3, 1879, Robert F. Morrison was elected Chief Justice, and S. B. McKee, Erskine M. Ross, John R. Sharpstein, G. D. Thornton, E. W. McKinstry, and M. H. Myrick were elected Associate Justices.

Despite the increase in the number of justices in 1880 and the division of the Court into departments it was not long before other steps had to be taken to relieve the increasing burden of the Court. In 1885<sup>30</sup> only five years after the number of justices had been increased from five to seven, the legislature authorized the Supreme Court to appoint "three persons of legal learning and personal worth" to assist the Court.

In 1890, in *People v. Hayne*,<sup>31</sup> a proceeding was brought in which it was contended that the statute authorizing the appointment of the Commissioners was unconstitutional in that it permitted the Commissioners to exercise judicial power. The opinion of Justice Fox in that case, in which the constitutionality of the law was upheld, pointed out that the reports and opinions of the Commissioners had no force or effect as judgments of the Court unless approved and adopted by the constitutional number of justices.

In 1880, Section 45 of the Code of Civil Procedure was amended<sup>32</sup> to provide, among other things, that no rehearing in bank could be granted unless by an order in writing signed by *five* justices. The Constitution, which was silent on rehearings, provided that *four* justices must concur before a judgment could be rendered in bank. In the famous case of *In re Jessup*<sup>33</sup> the Supreme Court held that Section 45 of the Code was unconstitutional in providing that the concurrence of five justices was necessary to grant a rehearing after decision in bank since the jurisdiction of the court was derived from the constitution.

<sup>28</sup>The salary was increased to \$8000 in 1905, and to \$10,000 in 1925. In 1927 salary of Chief Justice fixed at \$12,000, of Associate Justices at \$11,000.

<sup>29</sup>Stats. 1871-2, p. 391.

<sup>30</sup>Stats. 1885, p. 101.

<sup>31</sup>(1890) 83 Cal. 111; 23 Pac. 1, 17 Am. St. Rep. 217, 7 L. R. A. 348.

<sup>32</sup>Stats. 1880, p. 63.

<sup>33</sup>(1889) 81 Cal. 408, 6 L. R. A. 594, 22 Pac. 742.

### CREATION OF DISTRICT COURTS OF APPEAL

The Supreme Court Commission was abolished by Constitutional Amendment in 1904. In its place there were created three District Courts of Appeal of three justices each, one to sit in San Francisco, one in Los Angeles and one in Sacramento. The constitutional provision governing the jurisdiction of the Supreme Court was amended to give the Court jurisdiction in all cases in equity, except such as arise in Justice's Courts; in cases at law involving the title to, or possession of real estate, or the legality of any tax, impost or assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy amounts to \$2000; in such probate matters as provided by law, and, on questions of law alone, in all criminal cases where judgment of death had been rendered. The Supreme Court was also given jurisdiction of all cases and proceedings pending before a District Court of Appeal and which should be ordered by the Supreme Court to be transferred to itself for hearing and decision. The Court was empowered to order any cause pending before it to be transferred to a District Court of Appeal and to order any cause pending before a District Court of Appeal to be transferred to the Supreme Court for hearing and decision.

Not long after the adoption of these constitutional amendments the Supreme



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Court held, in *People v. Davis*,<sup>34</sup> that the power to transfer cases to the Supreme Court after decision by a District Court of Appeal was discretionary and not a matter of right, and that such hearings would be granted only to secure harmony and uniformity in the decisions and to settle doubtful or disputed questions of law, but the Supreme Court also stated in the case of *People v. Davis*, that the denial of a hearing by the Supreme Court after decision by the District Court of Appeal should not be deemed an approval of the opinion of the District Court of Appeal.

In denying hearings after decision by the District Court of Appeal the Supreme Court has, on numerous occasions, added a short opinion in which it has approved, disapproved, or withheld approval of a portion of the opinion of the District Court of Appeal.<sup>35</sup> This practice has raised questions concerning the effect of these opinions, and one justice has declared that the practice of qualifying denials of hearings is unconstitutional in that the constitution provides only that a hearing shall be granted or denied.<sup>36</sup>

*People v. Davis* also established the rule that when a hearing is granted by the Supreme Court after decision by the District Court of Appeal in cases properly appealable to the District Court of Appeal the Supreme Court will deem itself bound by the facts stated in the opinion of the District Court of Appeal. Several years later, in the leading case of *Burke v. Mase*<sup>37</sup> the Supreme Court declared, however, that where the Supreme Court has direct appellate jurisdiction and the case is transferred to the District Court of Appeal for hearing and decision, and then the Supreme Court grants a hearing after decision by District Court of Appeal, the Supreme Court will go beyond the facts stated in the opinion of the District Court of Appeal and will examine the record to determine whether any of the facts have been overlooked or misconceived in material particulars. This distinction between cases in which the Supreme Court has original appellate jurisdiction and those in which the District Court has original appellate jurisdiction is based upon the Constitutional provisions already discussed.<sup>38</sup>

#### THE ADOPTION OF SECTION 4½ OF ARTICLE VI

In early criminal cases the Supreme Court had, on occasion held that there was a presumption that where there was an error in the trial of a case there was an injury and the case should be reversed.<sup>39</sup> There were, however, sections of the Penal Code<sup>40</sup> which authorized the Court to disregard non-

<sup>34</sup>(1905) 147 Cal. 346, 81 Pac. 718.

<sup>35</sup>See, Comment, *Significance of the Practice of the California Supreme Court of Commenting on the Opinion of the District Court of Appeal When Denying a Hearing After Judgment* (1939), 28 Calif. L. Rev. 81.

<sup>36</sup>Mr. Justice Houser in *Wires v. Little* (1938), 27 Cal. App. 240, 82 Pac. (2d) 388; *Kane v. Universal Film Exchange, Inc.* (1939), 97 Cal. Dec. 75, 91 Pac. (2d) 577; *Scott v. McPheeter* (1939), 98 Cal. Dec. 225, 93 Pac. (2d) 562.

<sup>37</sup>(1909) 10 Cal. App. 206, 211, 101 Pac. 438, 440.

<sup>38</sup>See, Campbell, *Should Court Abrogate Burke v. Mase Rule or Extend It to All Cases?* (1940), 15 Calif. St. B. J. 129.

<sup>39</sup>*People v. Murphy* (1873), 47 Cal. 103; *People v. Furtado* (1881), 57 Cal. 345; *People v. Richards* (1902), 136 Cal. 127, 68 Pac. 477.

<sup>40</sup>Penal Code, Sections 960, 1258, 1404.

prejudicial errors, and in some later cases the Court demanded a showing of injury to a substantial right so far as possible without reviewing the record.<sup>41</sup> Generally, however, whether the Supreme Court failed to apply them or whether it found itself at a loss to determine when substantial rights of the defendant were infringed, the Penal Code sections had little effect in reducing reversals. In order to prevent reversals on the ground of non-prejudicial errors occurring at a trial, Section 4½ was added to the Constitution, 1911, to provide that no judgment should be set aside or new trial granted in any criminal case for misdirection of jury, improper admission or rejection of evidence, or for error in pleading or procedure unless the Court should be of the opinion that the error complained of resulted in a miscarriage of justice. The substantial decline in the reversal of criminal cases which followed, has been attributed to the adoption of this section.<sup>42</sup> In 1914 Section 4½ of Article VI was amended by striking out the word "criminal" thereby making the section applicable to all trials. The result is now that in criminal and civil cases the Court may weigh the evidence to determine whether there has been a prejudicial error.

#### CHIEF JUSTICES, 1904-1926

In 1888, William H. Beatty who had previously served as Chief Justice of the Nevada Supreme Court, was elected Chief Justice of the Supreme Court of California. He served in that capacity for twenty-five years, which is the

<sup>41</sup>*People v. Brotherton* (1874), 47 Cal. 388; *People v. Creeks* (1904), 141 Cal. 527, 75 Pac. 101.

<sup>42</sup>See, Vernier and Selig, *The Reversal of Criminal Cases in Supreme Court of California* (1928), 2 So. Cal. L. Rev. 42, 47.

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longest period of service on the Supreme Court of any justice of California. Among the many great opinions written by him are *Havemeyer v. Superior Court*,<sup>43</sup> a case concerning the rights and obligations of stockholders in a corporation where the state was seeking to declare a forfeiture of the corporate franchise, and *Fox v. Hale and Norcross Silver Mining Co.*,<sup>44</sup> an important mining case containing an excellent description of mining processes.

F. M. Angellotti, who served on the court for eighteen years, became chief justice in 1915, which office he held until his resignation in 1921. He was followed as chief justice by Lucien Shaw, who had been an associate justice since 1903, and who resigned in 1923. During the twenty years that Justice Shaw sat on the bench he wrote many outstanding opinions, among which were the famous water cases of *Title Insurance & Trust Co. v. Miller & Lux*,<sup>45</sup> and *Katz v. Walkinshaw*,<sup>46</sup> and the community property case of *Spreckles v. Spreckles*.<sup>47</sup>

Curtis D. Wilbur, who had been an associate justice since 1918, became chief justice in 1923 upon the resignation of Justice Shaw, and held that office until March, 1923, when he resigned to become Secretary of the Navy. He is now Justice of the Circuit Court of Appeals for the Ninth Circuit. Louis W. Myers, then associate justice, was appointed chief justice in 1924 and served as such until January, 1926.

#### CONSTITUTIONAL AMENDMENTS OF 1926

In 1926 Section 4¾ was added to Article VI of the Constitution. This section gave the Legislature power, in cases where trial by jury was not a matter of right or where it had been waived, to grant to appellate courts the power to make findings of fact contrary to, or in addition to, those made by the trial court; and to provide that such findings might be based on evidence adduced before the trial court, either with or without the taking of additional evidence. The Legislature was also authorized to grant to the Appellate Courts, for the purpose of making additional findings or for any other purpose in the interest of justice, to take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and to give or direct the entry of any judgment or order and to make such further or other order as the case may require.

Pursuant to this authorization, the Legislature, in 1927, added section 956a to the Code of Civil Procedure, which contains language substantially the same as that found in the constitutional provision and which authorizes the Court to

<sup>43</sup>(1890) 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

<sup>44</sup>(1895) 108 Cal. 369, 41 Pac. 308.

<sup>45</sup>(1915) 170 Cal. 686, 151 Pac. 398.

<sup>46</sup>(1920) 183 Cal. 71, 190 Pac. 433.

<sup>47</sup>(1903) 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 99 Am. St. Rep. 35, 64 L. R. A. 236.

This issue of the Bulletin was prepared by the Junior Barristers who are also in charge of the bi-monthly meeting and the regular monthly dinner meeting of the Los Angeles Bar Association.

The Juniors have asked B. Grant Taylor, clerk of the Supreme Court, to speak at the luncheon meeting January 7, 1941.

make the necessary rules for the exercise of this power.<sup>48</sup> In the leading case of *Tupman v. Haberkern*,<sup>49</sup> the Supreme Court was of the opinion that it was not the intention of the new law to destroy the boundary between the separate provinces of the trial and Appellate Courts. The new power has enabled the Appellate Courts to give relief from troublesome procedural requirements of the old system.<sup>50</sup>

The growth of the judicial council movement throughout the country led to the adoption of Section 1a of Article VI, of the Constitution, in 1926. This section created a Judicial Council consisting of the Chief Justice, one Associate Justice of the Supreme Court, three Justices of the District Courts of Appeal, four Judges of the Superior Court, one Judge of a Police or Municipal Court, and one judge of an inferior court, assigned by the Chief Justice to sit on the Council for a term of two years.

The Chief Justice is chairman of the Council and as such is charged with the duty of expediting judicial business and is given power to provide for the assignment of any judge to another Court of like or higher jurisdiction to assist a court whose calendar is congested, to act for a judge who is disqualified and to hold court where a vacancy has occurred.

The chief duties of the Council are to survey the condition of business in the several courts with a view to simplifying and improving the administration of justice, submit suggestions to the courts for the expedition of business, report to the Governor and Legislature at each session, adopt and amend rules of practice and procedure for the Courts not inconsistent with the law, submit to Legislature

<sup>48</sup>See, Rule XXXVIII of Supreme Court Rules, 213 Cal. XXXV.

<sup>49</sup>(1929) 208 Cal. 256, 280 Pac. 970.

<sup>50</sup>See, Comment, *Fact Finding Power of Appellate Courts in California* (1932), 20 Calif. L. Rev. 171.

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recommendations with references to changes in laws relating to practice and procedure, and exercise such other functions as may be provided by law.

Pursuant to the authority contained in this constitutional amendment, the Judicial Council, in 1928 adopted rules governing practice in the Supreme Court and the District Courts of Appeal.<sup>51</sup>

In 1928, Section 4 of Article VI of the Constitution was amended to remove therefrom the provision that the Supreme Court should have jurisdiction of any case in which the demand or the value of the property involved was \$2000.

#### RECENT CONSTITUTIONAL AMENDMENTS

In 1934 an initiative measure to provide a new method of selecting justices was adopted as Section 26, Article VI of the Constitution. In substance, this amendment provides that at a specified time before the expiration of his term, a justice may file his declaration of candidacy for election to succeed himself, and if he does not do so, the Governor may nominate a suitable person for the office. The name of the candidate is then placed on the ballot and the voters determine whether or not the candidate should succeed himself. A defeated candidate cannot be appointed to fill any vacancy in the Court, but he may be nominated again by the Governor.

Whenever a vacancy occurs in the Court because of failure of a candidate to be elected or otherwise, the Governor is empowered to fill the vacancy, the appointee to hold office until the following election. No nomination or appointment by the Governor is effective unless confirmed by a Commission on Qualifications consisting of the Chief Justice, Presiding Justice of District Court of Appeal and the Attorney General.

On the death of Justice Seawell in 1939, the Governor appointed Jesse W. Carter to fill his place. The Commission on Qualifications refused to consider his qualifications on the ground that he was ineligible for the office, thereby providing a test case. The difficulty was that at the time of his appointment Justice Carter was a State Senator and Section 19 of Article IV of the Constitution provided that no Senator or member of the assembly should, during the term for which he shall have been elected, hold or accept any office other than one filled by election by the people. The question was whether, after the adoption

<sup>51</sup>204 Cal. XXXIX; 213 Cal. XXXV.

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of Section 26 of Article VI described above, the office of a justice was an elective office. In the case of *Carter v. Commission on Qualifications of Judicial Appointments*,<sup>52</sup> the Supreme Court held that it was still an elective office and, accordingly, Justice Carter was qualified and took office.

Section 26 of Article VI authorized the Legislature to provide for the retirement of justices and judges. Pursuant to this authorization the Legislature in 1937<sup>53</sup> enacted a retirement act which provided that a justice of the Supreme Court, District Court of Appeal, or Judge of the Superior Court having attained the age of seventy years and having been a judge of the Supreme Court, District Court of Appeal, or Superior Court, or any two or more of said Courts for twelve years in the aggregate within the period of fifteen years immediately preceding may retire, and shall, during the remainder of his life receive an allowance equal to one-half the salary he last received as the incumbent of an office to which he was elected by the people. It is also provided that when the Governor finds that any justice or judge is unable to discharge efficiently the duties of his office by reason of mental or physical disability likely to be of a permanent character, he may, with the consent of the Commission on Qualifications, retire such justice or judge and fill the vacancy by appointment, provision being made for payment of retirement compensation.

Section 26 of Article VI also provided that Article XXIII relative to the recall of elective public officials should also apply to justices and judges. The methods of impeachment and recall recently proved inadequate to remove with sufficient promptness a judge of the District Court of Appeal convicted by a Federal Court for conspiracy to impede the administration of justice.<sup>54</sup>

In order to prevent a similar occurrence, a new section of the Constitution, Section 10 of Article VI, was adopted in 1938. Under the terms of this section, whenever a Justice of the Supreme Court, District Court of Appeal or a Judge of any Court of California has been convicted in any Court of this State or of the United States of a crime involving moral turpitude, the Supreme Court shall of its own motion or upon a petition filed by any person, upon finding that such a conviction has been had, enter its order suspending such justice or judge from

<sup>52</sup>(1939) 14 Cal. (2d) 179, 93 Pac. (2d) 931.

<sup>53</sup>Stats. 1937, p. 2204.

<sup>54</sup>See, *People v. Craig* (1937), 9 Cal. (2d) 615, 72 Pac. (2d) 135.

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office until the judgment of conviction becomes final. When the judgment of conviction becomes final, the Supreme Court may enter its order permanently disbaring such justice or judge. If the conviction is reversed, the suspension is to be removed.

#### JUSTICES, 1926-1941

In January of 1926 the members of the Court were William H. Waste, Chief Justice, William P. Lawlor, Thomas G. Lennon, Emmett Seawell, John E. Richards, John W. Shenk and Jesse W. Curtis, Associate Justices. Of this group only Justices Shenk and Curtis remain.

In 1926 Justices Lennon and Lawlor died in office. Justice Lennon who had been on the Court for seven years, was succeeded by Frank J. Finlayson. Justice Lawlor, who had been on the court for eleven years, was succeeded by Jeremiah F. Sullivan. Justice Finlayson and Justice Sullivan went out of office in December of 1926, and were succeeded by John W. Preston and W. H. Langdon, respectively.

Justice John E. Richards died in 1932, and was succeeded by Ira F. Thompson, who served until his death in 1937, when Frederick W. Houser was appointed to succeed him. Justice Preston resigned from the court in 1935, and was replaced by Nathaniel P. Conrey, whose death in 1936 resulted in the appointment of Douglas L. Edmonds to the court.

Justices Seawell and Langdon died in 1935. Justice Emmett Seawell, who had served on the Court for sixteen years was succeeded by Jesse W. Carter and Justice Langdon, who had served for thirteen years, was succeeded by Phil S. Gibson, then State Director of Finance.

William H. Waste, who had joined the Court as an Associate Justice in 1921 and had become Chief Justice January 1, 1926, upon the resignation of Chief Justice Myers, died June 6, 1940, after serving on the Court for nineteen years. Shortly thereafter, Governor Olson appointed Associate Justice Phil S. Gibson Chief Justice, and he assumed office June 10, 1940. The Governor then appointed Roger J. Traynor as Associate Justice to fill the vacancy caused by the elevation of Chief Justice Gibson. Justice Traynor took office August 13, 1940. The present members of the Supreme Court are: Phil S. Gibson, Chief Justice, and John W. Shenk, Jesse W. Curtis, Frederick W. Houser, Douglas L. Edmonds, Jesse W. Carter, and Roger J. Traynor, Associate Justices.

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## BIOGRAPHICAL SKETCHES OF PRESENT JUSTICES



## CHIEF JUSTICE PHIL SHERIDAN GIBSON

A native of Missouri who at the age of 12 entered the law business as his father's office boy is the present Chief Justice of California. Doubtless named for the great soldier under whom his father fought in the Civil War, Phil Sheridan Gibson found his own military career the turning point which led him from little Grant City, his birthplace, to his present high office in this State.

He worked his way through the University of Missouri where he obtained both his liberal arts and law degrees, and then became prosecuting attorney of his county. When the United States entered the Word War the young man promptly enlisted. In the thick of the fighting in France he achieved promotion to the rank of first lieutenant, and later was sent to the General Staff College.

After the Armistice, Lieutenant Gibson was assigned to staff work in England, where he made use of the opportunity for further law study at the Inns of Court. The heavy and continuous strain of his military service left him in poor health and he therefore decided to go West to seek recovery.

After stopping in Wyoming for a time, in 1923 he proceeded to Los Angeles, which has been his home ever since. Here he resumed his law practice, and taught at Southwestern University.

Although never before active in politics, Phil Gibson took a great interest in the candidacy of his friend Culbert L. Olson for the Governorship in 1938. When Governor Olson took office on January 1, 1939, he manifested the mutual confidence and respect which existed between the two men by calling upon Phil Gibson to serve as State Director of Finance.

Upon the death of Justice Langdon in August, 1939, Governor Olson had his first opportunity to appoint a Justice of the Supreme Court. He selected Phil Sheridan Gibson. Less than a year later Chief Justice Waste died. In June, 1940, at the age of 57, by appointment of Governor Olson, Phil S. Gibson became the eleventh Chief Justice of California.



#### ASSOCIATE JUSTICE JOHN WESLEY SHENK

On the first seat to the right of the Chief Justice sits the Court's senior member in years of service. He is John W. Shenk, the son of a country-town Methodist minister, born in 1875 at Shelburne, Vermont, near the shore of Lake Champlain. On account of the rule which permitted a clergyman to remain only one year in each town, the family had no chance to take root during his early life. Successive moves carried them westward to Omaha, where the father became editor of the "Christian Advocate", thus permitting the family to settle down for a few years. John Shenk there attended high school, and worked on farms and in the printing shop of his father's paper. Eventually he became foreman of the composing room and well qualified to call himself a printer by trade.

Abandoning his trade for higher learning, he entered Ohio Wesleyan University, but when in his sophomore year the Spanish War broke out, John Shenk left college to join the Army. He served in Porto Rico with the Fourth Ohio Volunteer Infantry, and then came back to finish college and receive his A.B. degree with the Class of 1900. The University of Michigan Law School was next, and he there acquired a J.D. degree in 1903. Promptly gaining admission to the California Bar, John Shenk commenced the practice of law in Los Angeles. This lasted but three years, after which he began the career of public service which has since continued without interruption. Four years as Deputy City Attorney of Los Angeles, and then three more as City Attorney, were followed by thirteen years as Judge of the Superior Court. In April, 1924, John W. Shenk became Associate Justice of the California Supreme Court.



#### ASSOCIATE JUSTICE JESSE WILLIAM CURTIS

Oldest in years, and second oldest in service upon the California Supreme Court Bench is Justice Jesse William Curtis. The tradition of the law is deep-rooted in the family of Justice Curtis, for his great-grandfather was Jesse L. Holman, Justice of the Supreme Court of Indiana, who wrote the first decision ever reported for that jurisdiction. The grandfather of Jesse Curtis was an Iowa lawyer, who brought his family west in a covered wagon. Both the father and the son of the Justice share with him the distinction of bearing the appellation, "Jesse Curtis, Lawyer."

Born in 1865 in San Bernardino, where his grandfather had established the family home, he graduated from the public schools there and then from the University of Southern California. The young man then entered his father's law office to prepare for admission to the Bar. After two years of study there, he recognized the advantages of further schooling, and entered the law school of Michigan University. He took his law degree in 1891 and returned to San Bernardino to practice in his father's firm. Later he formed a partnership with the late S. W. McNabb, and served a term as District Attorney.

In 1914 Jesse W. Curtis began his judicial career as Judge of the Superior Court. In 1923 Judge Curtis, although a Democrat, was elevated to the District Court of Appeal by his old San Bernardino schoolmate, Republican Governor Richardson. The final step to the Supreme Court was by appointment of Governor Richardson in 1926.

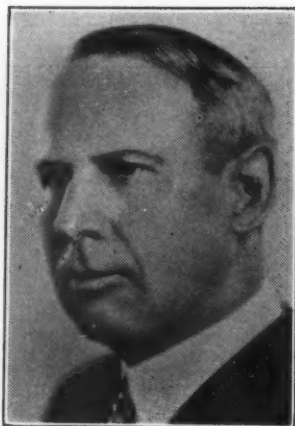


#### ASSOCIATE JUSTICE FREDERICK WILHELM HOUSER

A cross-roads point known as Johnson, Iowa, where the Houser family operated the post office and general store, was in 1871 the birthplace of this member of the Supreme Court. After living in various parts of Iowa, Frederick W. Houser attended Lennox College and then came with his parents to Los Angeles in 1886.

Abandoning his original ambition to practice medicine because of lack of sufficient money to go through a medical school, he learned stenography and then obtained a job in the law office of Senator Stephen M. White. This circumstance soon led Frederick Houser to commence the study of law. He entered Los Angeles Law School (which later became the University of Southern California), and in 1897 obtained admission to the Bar. He continued to work in White's office until the death of the Senator.

In 1902 Frederick Houser was elected to the Assembly and then was re-elected for the succeeding term. In 1906 the voters of Los Angeles County chose him for Judge of the Superior Court, where he remained until he was elected to the District Court of Appeal in 1922. In September, 1937 Governor Merriam appointed Frederick W. Houser to succeed Ira F. Thompson as Justice of the Supreme Court.



#### ASSOCIATE JUSTICE DOUGLAS LYMAN EDMONDS

One member of the Supreme Court has the unique experience of having served in all of the courts of record of the State of California within the space of ten years. This is Justice Edmonds, who is proud to trace his family on both sides of the house back to the American Revolution, and who can claim among his ancestry Joseph Warren, the hero of Bunker Hill.

Douglas L. Edmonds was born in Chicago in 1887. At the age of 10 he moved with the family to Redlands after which he lived in San Diego and then in Denver before he had completed his schooling. Eventually the Edmonds family returned to California. Douglas Edmonds obtained a job as a stenographer in the law office of Henry Clay Dillon in Los Angeles and managed to find time in early morning and late afternoon to attend law classes at the University of Southern California. After three years of law school he was admitted to practice in 1910. From then until 1926 he practiced law in Los Angeles, taking time out for two years to own and edit a paper known as "The Hollywood Enquirer."

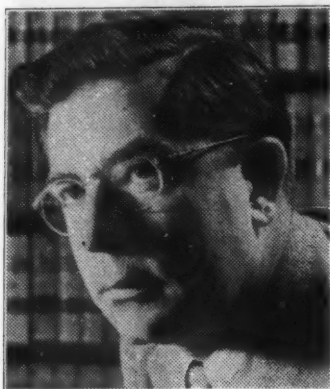
In 1926, when the Municipal Court system came into existence, the judicial career of Douglas Edmonds began as Governor Richardson appointed him Municipal Judge in Los Angeles. He served there for only a few months, then ran for a short term vacancy in the Superior Court. He was successful in that and went on to be re-elected in 1928 and 1934. In the Superior Court his experience was varied, including criminal, civil, and law and motion work, and was climaxed by his election as Presiding Judge. Beginning in 1935 he spent much of his time as justice pro tem in the District Court of Appeal. In September of 1936, just a few months more than ten years after he had first accepted judicial office in the Municipal Court, Douglas Lyman Edmonds, by appointment of Governor Merriam, became a Justice of the California Supreme Court.



**ASSOCIATE JUSTICE JESSE WASHINGTON CARTER**

In a log cabin on the Tinity River near Carrville, California, in 1888 began the remarkably varied career of Jesse W. Carter. As a farmer's son, and the next to the youngest of eight children, he learned early about hard work. His formal education began late because for a time there was no school in the community. When he finished grammar school, Jesse Carter went to work in the mines and the logging camps. Having accumulated \$300 in this way, he went to San Francisco to attend the Lick-Wilmerding school and put into use his interest in electricity. There he survived earthquake and fire to go ahead with his studies by night as he worked in the shops of a street railway by day. When the San Francisco graft prosecutions aroused his interest in legal matters, he took inspiration from the work of the hard-fighting prosecutor Heney, and entered Golden Gate Law School in 1909. In 1912 he was admitted to the Bar. There is a legend that he first sought a job in the legal department of the street railway which had employed him as an electrician, but no opening could be found for the future Justice. After practicing for a few months in San Francisco, he went to Redding, where he has made his home ever since. Two terms as District Attorney of Shasta County, an unsuccessful race for the State Senate in 1926, membership in the first Board of Bar Governors, the City Attorneyship of Redding and also of Mount Shasta, and two years on the Superior Bench were among the experiences which preceded the election of Jesse W. Carter to the State Senate in 1938.

Following the death of Justice Emmett Seawell, Senator Carter was on July 15, 1939, appointed Associate Justice of the California Supreme Court.



#### ASSOCIATE JUSTICE ROGER JOHN TRAYNOR

A scholar and a teacher of political science and law is the newest member of the Supreme Court of California, and, at age 40, is the second youngest man ever to sit upon that Bench.

Roger John Traynor, son of two natives of County Dorris, Ireland, was born in the little mining town of Park City, Utah. There he lived and went to school until he entered the University of California at Berkeley. After four years of college he became a teaching fellow in political science, continuing his studies at the same time. At the end of the succeeding four years, in 1927, he took both a Ph.D. and a J.D. degree, having advanced to the rank of instructor of political science and served as Editor of the California Law Review in the meantime. Roger Traynor then left his teaching to work in a San Francisco law office, but in 1928 returned to the Berkeley campus as a member of the Law Faculty. He remained there until Governor Olson appointed him to fill the vacancy which was created when Justice Gibson became Chief Justice after the death of William H. Waste.

Though his past life is predominantly that of a scholar and teacher, Roger Traynor does not lack experience in the practice of the law. As a nationally known authority on taxation and constitutional law, he has served as special adviser both to the State Board of Equalization and the Treasury Department of the United States. He is credited with the drafting of the California Personal Income Tax Law of 1935.

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